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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 696.

THE FIRST NATIONAL BANK OF CHICAGO, Trustee under the Last Will and Testament of Otto Young, Deceased, and in its Individual Capacity, GWENDOLYN YOUNG HEYWORTH KOCH, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, OTTILIE WICKES COCHRAN, BETTY WICKES SAGE, NANCY WICKES SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG WICKES, and JOHN WILLIAM YOUNG MARTIN, *Petitioners*,

v.

MARGARET DE KORWIN, Individually and as Executrix of the Will of Joseph Maria de Korwin, Deceased, *Respondents*.

REPLY BRIEF OF THE PETITIONERS TO THE REPLIES OF THE RESPONDENT AND GUARDIAN AD LITEM.

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v.

MARGARET DE KORWIN, Individually and as Executrix of the Will of Joseph Maria de Korwin, Deceased, *Respondents.*

REPLY BRIEF OF THE PETITIONER TO REPLIES OF THE RESPONDENT AND OF HOWARD D. MOSES, GUARDIAN AD LITEM FOR CERTAIN MINOR TRUST BENEFICIARIES.

Jurisdiction of This Court.

In the reply of Howard D. Moses, Guardian ad Litem, to the petition for certiorari, it is contended that this court has no jurisdiction to issue a writ of certiorari in this case, since the judgment of the Circuit Court of Appeals reversing and remanding the cause to the District Court is not a final judgment.

This is a confusion of terms. With reference to the obligatory jurisdiction of this court, in cases on appeal and

writ of error (Section 240(*b*) of the Judicial Code, as amended February 13, 1925, 43 Stat. 938, 28 U. S. C. A. 347(*b*), and Sec. 237(*a*) of the same act (28 U. S. C. A. 344(*a*)), it is elementary that the judgment appealed from must be final, that is, a final disposition of the case.

While with reference to the discretionary jurisdiction of this court to issue the writ of certiorari, (Section 240 of the same statute, paragraph (*a*)), 28 U. S. C. A. 347(*a*), there is no such requirement.

The following decisions of this court directly confirm this statement.

Forsyth v. *Hammond*, 166 U. S. 506, held there was no lack of power in this court to grant a writ of certiorari where the judgment of the Circuit Court of Appeals does not finally dispose of the matter but remands it to the District Court for further proceedings; the question presented being solely addressed to the discretion of the court.

Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117. In this consolidated case a number of judgments having been entered, they were taken to this court by writ of error. Later a petition for writ of certiorari was filed. This court dismissed the writs of error, holding that it was elementary that the writ would lie to review final judgments only. But the writ of certiorari was issued.

United States v. *General Motors*, 323 U. S. 373, was a condemnation case in which the District Court denied the introduction of certain evidence. The Circuit Court of Appeals reversed and remanded for further proceedings. This court granted certiorari to review a question that was fundamental to the further conduct of the case. (Also cited in our petition, page 21)

George A. Fuller Co. v. *Otis Elevator Co.*, 245 U. S. 489 (1918). The Circuit Court of Appeals reversed a judgment of the District Court and remanded for further proceedings. On petition for writ of certiorari it was objected that this court had no jurisdiction as the judgment was not final. The court held that (p. 492): "the writ when

issued to the Court of Appeals is not limited to cases in which a final judgment has been entered but only to cases in which the judgment when entered is final," that is, "when a writ of error or appeal does not lie."

Di Giovanni v. *Camden Insurance Co.*, 296 U. S. 64. The sole question was whether or not the jurisdictional limitation as to amount was satisfied. The Circuit Court of Appeals holding that the limitation was satisfied reversed the District Court and remanded the case for further proceedings. This court granted certiorari "to settle an important question of Federal law affecting the jurisdiction of the Federal Courts." (P. 66)

In *Brotherhood* v. *Pinkston*, 293 U. S. 95, there was the same situation and the writ was issued.

The following cases are a few of the many other cases in which writs of certiorari were issued to review Circuit Court of Appeals judgments which reversed and remanded the cause to the District Court for further proceedings.

Stringfeller v. *Atlantic Coast Line*, 290 U. S. 322
United States v. *Gulf Refining Co.*, 268 U. S. 542
Fairmount Glass Works v. *Coal Co.*, 287 U. S. 474
Gay v. *Ruff*, 292 U. S. 25
Armstrong Co. v. *Nu-Enamel Corporation*, 305 U. S. 315.

For further summary of pertinent cases, see Robertson's Practice and Procedure in the Supreme Court of the United States, Paragraph 7, Page 8, and Robertson & Kirkham on Jurisdiction of the Supreme Court of the United States, Paragraph 282, Section 308, Page 623.

The cases cited by the guardian ad litem do not support his statement.

Slaker, Administrator v. *O'Connor*, 278 U. S. 188, deals not with certiorari but with an appeal under Paragraph (b) of Section 240.

Martinez v. *International Banking Corporation*, 220 U. S. 214, 223, *Drake* v. *Kochersperger*, 170 U. S. 303, and *Clark*

v. *Kansas City*, 172 U. S. 334, are also appeal or writ of error cases.

The *Chicago & Northwestern Ry. Co.* v. *Osborne* case, consolidated with *The Chicago & Northwestern Ry. Co.* v. *Junod*, 146 U. S. 354, 355, was a certiorari case in which the judgment was not final, but there was no other reason for allowing the writ; which is merely another way of saying that this court will not exercise its discretion to issue the writ when no adequate reason is advanced for doing so.

Kingman & Co. v. *Western Manufacturing Company*, 170 U. S. 675. This case merely holds that it was one in that class of cases in which "the judgments of the Circuit Court of Appeals were made final," (P. 677) and is, therefore, in accord with the case cited above, *George A. Fuller & Co.* v. *Otis Elevator Co.*, 245 U. S. 489 (*supra*).

Lau Ow Bew, 141 U. S. 583, is not in point for the same reason.

There are three cases appearing in Volume 166 U. S. decided at the same term of this court, that are clearly indicative.

The Conqueror, 166 U. S. 110. This court held that certiorari is ordinarily issued after a final decree, but that it may be issued before, if this court be of the opinion that the facts of the case require an earlier interposition. (P. 113)

In *The Three Friends* case, 166 U. S. 1, the writ was issued for the same reason.

And in *Forsyth* v. *Hammond*, 166 U. S. 506 (cited above), the court reviews the other cases and repudiates counsel's contention in this case.

As to the Charge that the Record in this Case has been Distorted and Misrepresented.

The respondent in his reply (page 1) contends that the record has been "distorted and misrepresented" in this case.

The Illinois Statute with reference to the contest of wills cited by counsel for the respondent, 1945 Revised Statutes, Chapter 3, Section 243, (see also Jones Illinois Statutes Annotated, 110.340, also .339) relates to the statutory contest of a will where the issue *is whether the instrument produced is the will of the testator. Joyal* v. *Pillotte,* 293 Ill. 377, 381.

The case at bar is not a suit to contest the will of Otto Young in that sense. It has never been so contended. If it had been so contended, the will having been probated in 1907 (R. 7) the cause would have been outlawed in February 1908, or approximately thirty-five years before this suit was brought. No where was that contention made in the complete answers filed by the Petitioners. (R. 36) Nor is the contention found at any point in the petition for certiorari.

The attack which the respondent makes on the Otto Young will in the instant case is that the provisions of the testamentary trust "are void" (R. 12) and that "the entire disposition" (of the residuary clause of the will) "is void" (R. 13, 19). He invokes the Illinois Statute of Descent on the ground that the property is accordingly intestate. It is that statute which creates the rights in common in the heirs of the decedent with reference to intestate property. And it is those rights which can not be taken away or adjudicated in the absence of any one of the heirs in whom the rights are created.

As to Respondent's Contention that There is no Conflict in Decisions of the Circuit Courts of Appeals on the Proposition that Federal and Not State Law Controls in Determining Indispensable Parties.

The respondent's answer to petitioners' assertion that State law controls asserts a distinction in the decisions of the Eighth Circuit in the fact that those cases were law and not equity cases. *Young* v. *Garrett,* 149 Fed. (2d) 223, (erroneously cited by respondent as 14 Fed. (2d) 223); *Thomson* v. *Butler,* 136 Fed. (2d) 644.

He then cites *First Trust and Savings Bank* v. *Iowa-Wisconsin Bridge Company,* 98 Fed. (2d) 416, 420, wherein the same circuit held that the Federal Rules governed, as the Conformity Act of 1872 is not applicable to equity causes.

In that decision no reference was made to the *Erie* case (*Erie* v. *Tompkins,* 304 U. S. 64) or the *Ruhlin* case (*Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202), which were decided some three months before. And in the cases subsequently decided, above cited by the petitioners, there is no reference to *First Trust and Savings Bank* v. *Iowa-Wisconsin Bridge Company,* 98 Fed. (2d) 416.

But meanwhile that question has been finally decided by this court in the case of *Guaranty Trust Company* v. *York,* 326 U. S. 99, which held that the doctrine announced in the *Erie* case applies also to equity causes, and that State law controls in such causes.

As to the Respondent's Contention that the Law of Illinois does not Make the Heirs in such a Case Indispensable Parties.

The respondent cites *Pennsylvania Company* v. *Bauerle,* 143 Ill. 459, 462, for this proposition. In this case there was no contention that any part of the will was invalid. The will stood unattacked. The sole issue was as to its meaning. The legatees were the only parties in interest. In addition to the paragraph quoted by the respondent, the Supreme Court of Illinois said: (P. 479)

> "We are unable to see what interest the heirs can have in the matter. * * * No part or parcel of the residuary estate, or of its proceeds, can, under any interpretation that can be placed upon the provisions of the will, be regarded as intestate property."

The Alleged Federal Question.

Both the respondent and the guardian ad litem contend that the judgment of the Circuit Court of Appeals is sustainable on the ground that there is involved a Federal question, and also a class suit.

It is stated by the respondent, without any basis, that the petitioners admit that the complaint states a good class suit and that a Federal question is presented. (P. 8)

Both of these points were urged by respondent and contested by the petitioners, but neither of them were passed upon by the Circuit Court of Appeals which only decided the question of jurisdiction on the ground of diversity of citizenship. Consequently our petition for writ of certiorari to correct that error did not involve either of the other two points.

But in view of counsel's contention that the judgment of the Circuit Court of Appeals is sustained by both propositions, we desire to point out here that there is neither a Federal question involved nor a class suit.

The alleged Federal question is said to grow out of the following facts:

The Trustee originally named in the Will was First Trust and Savings Bank of Chicago, a corporation organized under the laws of the State of Illinois (R. 16); on February 11, 1929, that corporation was consolidated with Union Trust Company, an Illinois corporation, and the consolidated company changed its name to First Union Trust and Savings Bank, an Illinois corporation (R. 17). On July 17, 1933, First Union Trust and Savings Bank was consolidated into and merged with The First National Bank of Chicago, a national banking institution, pursuant to approval of the Auditor of Public Accounts of the State of Illinois, and a certificate of consolidation issued by the Comptroller of Currency of the United States. (Comp. R. 18; Amended Complaint, R. 142)

Certainly no Federal question arises on the first consolidation of the two Illinois corporations. In fact, that consolidation was proper under the law of Illinois. *Chicago Title and Trust Company* v. *Zinzer*, 264 Ill. 31.

The respondent charges that the last consolidation being accomplished and authorized by the National Banking Act, known as the McFadden Act of 1927, a Federal question

arose as to whether the consolidated bank had the power or authority to succeed to the trusteeship in the Otto Young Estate formerly exercised by its predecessors, First Trust and Savings Bank and First Union Trust and Savings Bank.

No Federal question arises out of those facts.

The McFadden Act of 1927 (12 U. S. C. A. Sec. 34(a)) makes provision for consolidation of a State Bank with a National Bank. The consolidation in this case with The First National Bank of Chicago under the McFadden Act does not give the Federal Court jurisdiction.

An Act of Congress so provides. (Title 28 U. S. C. A. Sec. 42)

Bankers Trust Co. v. *Texas & Pacific R. R. Co.*, 241 U. S. 295
Federal Land Bank Co. of Omaha and New Amsterdam Casualty Co. v. *United States National Bank of Omaha*, 8th Circuit, 13 Fed. (2d) 36
Denicke v. *Brigham*, 142 Fed. (2d) 221, 9th Circuit, (certiorari denied, 323 U. S. 729, 816)

The McFadden Act in *Ex Parte Worcester County National Bank*, 279 U. S. 347, was upheld as constitutional on the ground that the challenged provisions authorizing a bank incorporated or consolidated under the Act to succeed to trusteeship of its predecessor, was not directory but merely permissive; and that being permissive, *the right of succession would depend upon the State law.*

That question having been decided by this court no longer furnishes the ground for Federal jurisdiction.

Water Service Co. v. *Redding*, 304 U. S. 252.
Alabama Power Co. v. *Ickes*, 302 U. S. 464.
Levering and Garrigues Co. v. *Morrin*, 289 U. S. 103.

The only remaining question on this issue is a State law question, namely, whether the Illinois State Law would permit the institution consolidated or incorporated under the McFadden Act to succeed to the trusteeships of its predeces-

sor. This must necessarily have been answered upon the consolidation of the two State banking corporations prior to the McFadden Act consolidation and would again be authorized under the same decision, *Chicago Title and Trust Company* v. *Zinzer*, 264 Ill. 31.

Hence, there is no Federal question here involved.

As to the Claimed Class Suit.

The contention has no validity. The suit clearly falls outside of the principles of philosophy of the class suit as set forth in Rule 23 of the Rules of Civil Procedure. The class is not so numerous as to make it impractical to bring all of its members before the court. In fact, they were actually made parties and brought before the court prior to the time the jurisdictional question was raised. And the absent ones are not fairly represented by those who bring the suit.

Hansberry v. *Lee*, 311 U. S. 32.

As to the Amended Complaint.

It is contended by respondent's counsel (pages 8, 9) that the amended complaint sought to be filed below was for the purpose of correcting a technical defect with reference to the citizenship of the parties defendant. In fact the amended complaint sought to correct the jurisdictional defect complained of by striking out the indispensable parties defendant in question. The District Court was under no obligation to perform the futile act of allowing the amended complaint to be filed which did not correct that jurisdictional defect. (R. 128)

Minnesota v. *Northern Securities Co.*, 184 U. S. 199, 246.

Arizona v. *California*, 298 U. S. 558, 572.

Alabama v. *Arizona*, 291 U. S. 286, 291, 292.

Georgia v. *Pennsylvania Railroad Co.*, 324 U. S. 439, 445.

Rules of Civil Procedure, Rule 19(b), 82.
Cyclopedia of Federal Procedure, 2nd Edition, § 1898, Vol. 5, P. 626.

For the same reason the contention of the guardian ad litem as to its counterclaim is of no validity.

Respectfully submitted:

THE FIRST NATIONAL BANK OF CHICAGO,
Individually and as Trustee of the Testamentary Trust of Otto Young, Deceased,

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